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UNSEEN EXCLUSIONS IN VOTING AND IMMIGRATION LAW

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I. Introduction

Nineteen sixty-five proved monumental in the history of race relations in the United States. In New York, Malcolm X was assassinated, while in Selma, Alabama, state police officers attacked civil rights marchers in what would come to be known as “Bloody Sunday”. That fall, Congress enacted two pieces of legislation that promised to alter the United States’ long engagement with racism. Less than two months apart, Congress sent President Lyndon B. Johnson legislation that broke from longstanding practices of formally excluding people of color from two core features of United States society: voting and the right to live in the United States. The Voting Rights Act of 1965,¹ enacted on August 6, went a long way toward eliminating the overt race-based barriers to participation in the nation’s electoral system. Meanwhile, the Hart-Celler Act,² adopted on October 3, repealed the decades-old legislation that limited immigration based on racial quotas.

Despite falling within the civil rights era’s prevailing narrative of a nation busy shedding the remnants of its regrettable past, neither the Voting Rights Act nor the Hart-Celler Act permanently eliminated racially disparate treatment in voting or immigration law.³ With time, legislators adopted facially race-neutral eligibility criteria that uniquely hinder the ability of people of color to vote or live in the United States. Unlike the overtly race-based laws and practices that preceded enactment of these landmark statutes, contemporary restrictions are based on violations of ostensibly race-neutral criminal laws. Subjected to criminal punishment or removal from the United States as a result of engaging in criminal activity, these individuals are rendered invisible in the eyes of the law. Immigration law does this through its power to detain and deport, while voting access law does this by

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¹ Voting Rights Act of 1965, P.L. 89-110, 79 Stat. 437.

² Immigration Act of 1965 (Hart-Celler Act), P.L. 88-236, 79 Stat. 911.

³ See HIROSHI MOTOMURA, AMERICANS IN WAITING: THE LOST STORY OF IMMIGRATION AND CITIZENSHIP IN THE UNITED STATES 132 (2006) (describing the Hart-Celler Act as “part of a basic movement toward civil rights in American public law that included the Civil Rights Act of 1964 and the Voting Rights Act of 1965”).

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disenfranchising convicted offenders. The Supreme Court's decision in *Shelby County v. Holder*⁴ exemplifies this practice by heavily touting voter turnout statistics that exclude the hundreds of thousands of African Americans left off the voter rolls because of a conviction. Though it is impossible to know whether including African Americans disenfranchised because of a conviction in the statistics that the majority relied upon would have altered its conclusion—there is plenty of reason to doubt that it would—the Court's willingness to overlook this important feature of contemporary voting exemplifies the allure of using the stain of criminality to erase the very presence of these individuals from legal discourse.

II. Civil Rights Origins

The Voting Rights Act and the Hart-Celler Act were enacted in the midst of the civil rights movement. In their own way, each was a reaction to overtly racist legal practices that marginalized communities of color for generations. The Voting Rights Act addressed state and local efforts to prevent African Americans from voting, which the Court once described as “an insidious and pervasive evil,”⁵ while the Hart-Celler Act eliminated the national origins quotas that President Truman described as “a slur on the patriotism...of our citizenry.”⁶

For its part, the Voting Rights Act was Congress' effort to ensure that African Americans could access the ballot box.⁷ As the Court explained when it first upheld the law, “The Voting Rights Act of 1965 reflects Congress' firm intention to rid the country of racial discrimination in voting.”⁸ It did this by creating a multi-layered oversight scheme, including the preclearance requirement at the heart of *Shelby County*.

Soon the face of voting literally changed. African Americans registered and took to the polls in significantly larger numbers than the paltry few reported prior to 1965.⁹ Whereas less than 25% of African Americans in the South were registered to vote in 1954, more than two-thirds were registered in 1970.¹⁰ Importantly, the number of African American officeholders also

⁴ 133 S.Ct. 2612 (2013).

⁵ *South Carolina v. Katzenbach*, 383 U.S. 301, 309 (1966).

⁶ MAE M. NGAI, *IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA* 239 (2004).

⁷ See George Bundy Smith, *State Courts and Democracy: The Role of State Courts in the Battle for Inclusive Participation in the Electoral Process*, 74 N.Y.U. L. REV. 937, 942 (1999).

⁸ *South Carolina v. Katzenbach*, 383 U.S. 301, 315 (1966).

⁹ See HARVARD SITKOFF, *THE STRUGGLE FOR BLACK EQUALITY, 1954-1992*, 220 (1993).

¹⁰ *Id.*

increased—from less than 100 before the Voting Rights Act's enactment to almost 2,500 fifteen years later.¹¹

Meanwhile, the Hart-Celler Act for the first time removed all formal racial restrictions from immigration law. Instead, the act adopted an immigration law architecture that was formally equal. Rather than restrict immigration by relying on racial classification of potential newcomers, the 1965 act allotted each country of the Eastern Hemisphere 20,000 admissions slots per year, and an additional 120,000 slots were to be divided up among the Western Hemisphere countries based on demand.¹² In 1976, the per-country cap would be extended to Western Hemisphere countries.¹³ Much as the Voting Rights Act did for elections, the Hart-Celler Act's amendments to immigration law literally changed the face of immigration. Suddenly citizens of countries who had long been excluded from the United States, most notably Asian countries, were able to come to the United States.¹⁴

III. Civil Rights Backlash

The Voting Rights Act and the Hart-Celler Act marked tectonic shifts in the United States' formal reliance on racially discriminatory practices in voting and immigration. The old paradigm that permitted overt racism to govern these key aspects of life was no longer politically palatable.¹⁵

Proponents of the racially discriminatory policies that dominated United States history through the mid-twentieth century, however, were not always so willing to change their ways. As early as 1961, Barry Goldwater, United States senator from Arizona and the Republican Party's presidential nominee in 1964, advocated a strategy that involved essentially ignoring the concerns of African Americans since, as he put it, "We're not going to get the Negro vote as a bloc in 1964 and 1968, so we ought to go hunting where the ducks are."¹⁶ This position would eventually come to be known as the Republican Party's "Southern Strategy" that occupied a prominent role in Republican politics. As utilized by presidential candidate Richard Nixon, the Southern Strategy morphed into a putative concern about criminality.¹⁷ Importantly, at the strategy's core was a thinly veiled claim that African Americans were

¹¹ *See id.*

¹² *See* NGAI, *supra* note 6, at 258.

¹³ *Id.* at 261.

¹⁴ *See* MOTOMURA, *supra* note 3, at 133.

¹⁵ *See e.g.*, Gabriel J. Chin, *The Civil Rights Revolution Comes to Immigration Law: A New Look at the Immigration and Nationality Act of 1965*, 75 N.C. L. REV. 273, 337 (1996).

¹⁶ Jack Bass, *That Old-Time "Southern Strategy,"* SALON (March 24, 2004), http://www.salon.com/2004/03/25/southern_strategy/.

¹⁷ *See* KATHERINE BECKETT, MAKING CRIME PAY: LAW AND ORDER IN CONTEMPORARY AMERICAN POLITICS 38 (1997).

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at the root of the nation's criminal troubles.¹⁸

By the 1980s, the concern about crime had become mainstream and expanded to include a fear that immigrants were also engaging in widespread law breaking. For example, many of the Cubans who came to the United States in large numbers during this period were said to have been released from Castro's prisons (a claim later proved inaccurate).¹⁹ Meanwhile, in 1987 Republican U.S. Representative Lamar Smith claimed, "Jamaicans, mostly illegal aliens, have developed a massive criminal organization that imports and distributes narcotics."²⁰

IV. Social Control Though Fear Of Crime²¹

More than having simply violated the law, criminal offenders were framed as moral offenders. Their actions were seen as voluntary decisions to flout good sense and instead engage in a species of moral depravity.²² Violators essentially came to be seen as incorrigible individuals unworthy of participation in core components of life in the United States. Access to the voting booth and continued lawful residence in the country were soon linked to an individual's exposure to the criminal justice system.

Beginning in the 1980s, Congress increasingly tied immigration law to criminal law. Convictions for a larger set of offenses, including fairly minor crimes, resulted in removal from the country.²³ Meanwhile, administrative and judicial options for equitable relief were repealed throughout the late 1980s and early-to-middle of the 1990s.²⁴

Voting law took a similar turn. Supported by the Fourteenth Amendment's allowance of disenfranchisement for engaging in crime,²⁵ states

¹⁸ *See id.*

¹⁹ Ramiro Martinez, Jr., Matthew T. Lee, and Amie L. Nielsen, *Revisiting the Scarface Legacy: The Victim/Offender Relationship and Mariel Homicides in Miami*, in *RACE, CRIME, AND JUSTICE: A READER* 263 (Shaun L. Gabbidon & Helen Taylor Greene eds., 2005).

²⁰ 133 Cong. Rec. H8961, 1987 WL 849327 (daily ed. Oct. 22, 1987) (statement of Rep. Smith).

²¹ This section is clearly inspired by DAVID GARLAND, *THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY* (2001).

²² *See* Ian Haney López, *Post-Racial Racism: Racial Stratification and Mass Incarceration in the Age of Obama*, 98 CAL. L. REV. 1023, 1034 (2010).

²³ *See* Padilla v. Kentucky, 559 U.S. 356, 363 (2010). (describing a "steady expansion of deportable offenses").

²⁴ *See* Ira J. Kurzban, *Democracy and Immigration*, in *KEEPING OUT THE OTHER: A CRITICAL INTRODUCTION TO IMMIGRATION ENFORCEMENT TODAY* 63, 64 (David C. Brotherton & Philip Kretsedemas eds., 2008).

²⁵ U.S. Const. Amend. XIV, § 2; *see* Richardson v. Ramirez, 418 U.S. 24 (1974) (upholding felon disenfranchisement).

across the country have long limited criminal offenders' ability to exercise the franchise.²⁶ With the growth of criminal prosecutions that started in the 1970s, however, an ever-larger number of people have lost their right to vote.²⁷ Approximately 4.7 million voting age United States citizens could not vote in 2000.²⁸ This is especially true of African Americans—approximately thirteen percent of African American males could not vote in 2004 due to a conviction, and in 2000 there were fifteen states in which more than ten percent of the African American voting age population as a whole could not vote for this reason.²⁹ Of the six states originally covered by the Voting Rights Act's preclearance requirement that *Shelby County* eviscerated, only Louisiana and South Carolina are not among these fifteen states.³⁰ Strikingly, over sixteen percent of voting age African Americans in Virginia (161,559 individuals), one of the covered jurisdictions, could not vote in 2000 due to a conviction.³¹ Among the three states that were subjected to preclearance by the 1975 amendments to the Voting Rights Act, one (Arizona) disenfranchised more than ten percent of its voting age African American population in 2000 and Texas was a close second, disenfranchising 9.6% of its sizable 1.8 million African Americans of voting age.³² Overall, more than 1.8 million African Americans could not vote in 2000 because of a conviction.³³

This important aspect of modern elections in the United States is entirely absent from *Shelby County*. This is a particularly glaring omission in the majority opinion's analysis. Despite the majority's heavy reliance on turnout by eligible African American voters in the covered jurisdictions,³⁴ it fails to acknowledge that voter eligibility is severely affected by disenfranchisement laws that turn upon convictions. Examining only the rate at which eligible African Americans voters make it to the polls in comparison to eligible white voters renders invisible the millions of African Americans who cannot enter the voting booth because of a conviction.

As with immigration law's contemporary reliance on criminal convictions to decide who is a desirable non-citizen resident, voting laws that

²⁶ Christopher Uggen & Jeff Manza, *Disenfranchisement and the Civic Reintegration of Convicted Felons*, in CIVIL PENALTIES, SOCIAL CONSEQUENCES 67, 69 (Christopher Mele & Teresa A. Miller eds. 2005).

²⁷ *Id.* at 69.

²⁸ See Uggen & Manza, *supra* note 26 at 777, 795 (2002).

²⁹ Uggen & Manza, *supra* note 26, at 67, 72.

³⁰ See Uggen & Manza, *supra* note 26, at 798 appx. tbl. B. The six states originally covered by the preclearance requirement are Alabama, Georgia, Louisiana, Mississippi, South Carolina, and Virginia. *Shelby County v. Holder*, 133 S.Ct. 2612, 2620 (2013).

³¹ See Uggen & Manza, *supra* note 26, at 798 appx. tbl. B.

³² See *id.*

³³ *Id.*

³⁴ See e.g., *Shelby Cnty*, 133 S.Ct. at 2619, 2621, 2625, 2626, 2627.

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turn on convictions are putatively neutral when in reality they weigh heavily on traditionally marginalized communities of color. Facially race-neutral categorization allows courts and observers to ignore the subtler phenomenon at work—the criminal justice system is not race-neutral and neither is any secondary effect that turns on involvement with the criminal justice system.

V. Conclusion

Products of the civil rights era’s liberalization of the United States legal system, the Voting Rights Act and Hart-Celler Act promised a future devoid of the overtly racist laws prevalent in so much of this country’s history. While both helped the nation move in a more enlightened direction, neither went uncontested. Within a few decades, proponents of the old racial order and their more politically savvy descendants identified an acceptable replacement for the old racism—crime—which was linked to people of color. Immigration law and voting rights law quickly became tied to criminal convictions. The end result was a regime of immigration laws and voting rights laws that is race-neutral on its face and anything but in practice. *Shelby County* simply exemplifies the consequence of this paradigm. Framed as moral scofflaws, it is easy to ignore the individuals who have lost their claim to membership in this political community. We can simply pretend, as the majority does, that they simply do not exist and therefore do not need to be taken into account when concluding that “50 years later, things have changed dramatically.”³⁵

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³⁵ *Id.* at 2625.